



May 9, 2002

Mr. Edward H. Perry
Assistant City Attorney
City of Dallas
1500 Marilla, 7DN
Dallas, Texas 75201

OR2002-2471

Dear Mr. Perry:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 162602.

The City of Dallas Marshall's Office (the "city") received a request for 1) original petitions in lawsuits alleging abuse at the Dallas Detention Center, 2) a "true and correct copy" of a videotape depicting the requestor because "the copy previously provided has some irregularities," 3) "a tape isolating the continuous feed of [a particular] camera view," 4) all complaints against any personnel at the Dallas Detention Center during a specified time period, and 5) copies of personnel file photos of five named officers. As you did not submit information responsive to category one of the request, we assume that you have released such information to the extent that it exists. If you have not released any such information, you must do so at this time. *See* Gov't Code §§ 552.301(a), .302. With regard to categories two and three of the request, you inform us that you have provided the requestor with a true and correct copy of the videotape in the form maintained by the city. *See* Gov't Code § 552.228(a); *see also Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex.Civ.App.—San Antonio 1978, writ dismissed w.o.j.) (governmental body not required to prepare new information to respond to request). Finally, this office has previously determined that you must release the information that you seek to withhold in Exhibit B. *See* Open Records Letter No. 2002-1645 (2002); *see also* Open Records Decision No. 673 at 6-7 (2001) (criteria of previous determination regarding specific information previously ruled on). Accordingly, this ruling is limited to Exhibits C and D, which you claim are excepted from disclosure under sections 552.101, 552.102., 552.108, 552.117, 552.1175, and 552.119 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹

¹ We assume that the representative sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. You assert that the information in Exhibit C is subject to the Medical Practice Act (the "MPA"). Occ. Code §§ 151.001-165.160. Section 159.002 of the MPA provides:

- (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.
- (b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.
- (c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code §§ 159.002, .004; Open Records Decision No. 598 (1991). We agree that Exhibit C contains medical records and communications, which may be disclosed only in accordance with the MPA. *See* Occ. Code §§ 159.002, .004; Open Records Decision Nos. 598 (1991), 546 (1990) (because hospital treatment is routinely conducted under supervision of physicians, documents relating to diagnosis and treatment during hospital stay would constitute protected MPA records). We have marked those documents that may be released only in accordance with the MPA. However, some of the information in Exhibit C is not subject to the MPA and must therefore be released.

We turn then to the personnel file photos. You assert that one of the photos is excepted by section 552.119 of the Government Code. Section 552.119 excepts from public disclosure a photograph of a peace officer² that, if released, would endanger the life or physical safety of the officer unless one of three exceptions applies. The three exceptions are: (1) the officer is under indictment or charged with an offense by information; (2) the officer is a party in a fire or police civil service hearing or a case in arbitration; or (3) the photograph is introduced as evidence in a judicial proceeding. This section also provides that a photograph excepted from disclosure under this section may be made public only if the peace officer gives written consent to the disclosure. Open Records Decision No. 502 (1988). The submitted photograph depicts a peace officers, and it does not appear that any of the

²"Peace officer" is defined by article 2.12 of the Code of Criminal Procedure.

exceptions are applicable. You have not informed us that the peace officer has executed any written consent to disclosure. Thus, we agree that you must withhold the requested photograph depicting a peace officer. You inform us that the other Dallas Detention Center employees whose personnel photographs were requested are not peace officers. Therefore their photographs are not excepted from disclosure under section 552.119. However, we will address the other exceptions you claim apply to these photographs.

You first assert that the other requested photographs are excepted by common law privacy concerns. Sections 552.101 and 552.102 encompass the common law right of privacy. *See Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.) (test to be applied for section 552.102 is same as test for common law privacy under section 552.101). Ordinarily, information is protected by common law privacy only if it (1) contains highly intimate or embarrassing facts, the release of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). We note, however, that employee privacy under section 552.102 is significantly narrower than common law privacy under section 552.101, because of the greater public interest in the disclosure of information relating to public employees. *See* Attorney General Opinion JM-229 at 2 (1984); Open Records Decision Nos. 470 (1987), 444 (1986), 423 (1984). Generally, section 552.102 protects only that information that reveals "intimate details of a highly personal nature." *See* Open Records Decision No. 315 (1982).

Based on our review of the representative sample you have submitted, we do not believe that the personnel photographs that are at issue reveal intimate details of a highly personal nature. Accordingly they may not be withheld under section 552.101 or 552.102 in conjunction with traditional common law privacy.

However, information may also be withheld under section 552.101 in conjunction with common law privacy upon a showing of certain "special circumstances." *See* Open Records Decision No. 169 (1977). This office considers "special circumstances" to refer to a very narrow set of situations in which the release of information would likely cause someone to face "an imminent threat of physical danger." *Id.* at 6. Such "special circumstances" do not include "a generalized and speculative fear of harassment or retribution." *Id.* You assert that release of these photographs "may permit a disgruntled person to harass" the pictured individuals. Because we find your assertion does not rise above the level of a generalized and speculative fear of harassment, we conclude that the photographs of the non-peace officers may not be withheld under section 552.101 in conjunction with the common law privacy doctrine of "special circumstances."

You also assert that the photographs are excepted under section 552.108 because "[p]eace officers may be given different assignments during their term of employments which may require confidentiality." As you have informed us that these other individuals are not peace officers and you have made no other specific argument as to how release of these photographs would interfere with the detection, investigation, or prosecution of crime, we conclude that the photographs of the non-peace officers may not be withheld under

section 552.108. *See* Gov't Code §§ 552.108(a)(1), (b)(1), .301(e)(1)(a); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977) (governmental body claiming section 552.108 must reasonably explain, if information does not supply explanation on its face, how and why release of requested information would interfere with law enforcement).

Finally, you assert that these photographs are excepted from disclosure by sections 552.117 and 552.1175 of the Government Code. By their terms, these sections only except information that relates to the home address and telephone numbers, social security numbers, and family relationships of certain government employees. Because the requested personnel photographs do not relate to any of the specifically excepted information, they may not be withheld on the basis of either of these sections. *See* Open Records Decision No. 478 at 2 (1987) (language of confidentiality statute controls scope of protection). As we have determined that none of the exceptions you claim for the photographs of the non-peace officers apply, you must release these photographs.

In summary, the information you marked in Exhibit B must be released in accordance with Open Records Letter No. 2002-1645. The city may only release the marked medical records in Exhibit C in accordance with the MPA. The remaining documents in Exhibit C must be released. The peace officer's photograph in Exhibit D must be withheld under section 552.119. The other requested photographs, which do not portray peace officers, must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report

that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/seg

Ref: ID# 162602

Enc. Marked documents

c: Mr. Brian R. Gray
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Dallas, Texas 75220-1823
(w/o enclosures)